



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00655/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham**

**On 30 April 2015**

**Determination**

**Promulgated**

**On 28 May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**TEDROS MEHARI**

Respondent

**Representation:**

For the appellant: Mr N Smart, Senior Home Office Presenting Officer

For the respondent: Mr N Stevens, Counsel instructed by Duncan Lewis Solicitors

**DETERMINATION AND REASONS**

**Introduction**

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is a citizen of Eritrea born on 3 July 1974. However for the sake of convenience, I shall refer to Mr Mehari as the appellant and the Secretary of State as the respondent which are the designations they held before the First-tier Tribunal.

2. The appellant applied to the SSHD seeking to have the deportation order made against him on 9 February 2009, following a court recommendation, revoked under paragraph 390 of the Immigration Rules. The respondent refused that application without right of appeal. The respondent appealed against that decision to the First-tier Tribunal Judge Grimmett who allowed the appellant's appeal in a determination promulgated on 10 December 2014. The respondent now appeals against that determination of the First-tier Tribunal Judge.
3. Thus the appeal came before me.

### **Findings of First-tier Tribunal**

4. The first-tier Tribunal Judge saw no merit in the appellant's appeal in respect of his asylum and humanitarian protection grounds. He stated that the appellant's asylum appeal has been considered in two determinations and dismissed. He stated that following the principles in **Devaseelan [2002] UKIAT 00702** that the appellant would not be at risk in Eritrea for any reason and there is no new evidence provided which would lead him to reach a different conclusion.
5. The Judge also dismissed the appellant's application pursuant to paragraph 276 ADE the Immigration Rules and stated since the decision was prior to July 2012, the appellant has not been able to demonstrate that he has the necessary 14 years continuous residence in the United Kingdom because the original decision of 3 November 1994 was made under section 15 (1) as it was then, of the Immigration Act 1979. By virtue of the former 276B be (i) a notice of intention to deport stopped time running for continuous residence.
6. The Judge however allowed the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights. After taking into account section 11C and 117D (ii) which provides that a foreign criminal is someone who is not British and has been convicted in the United Kingdom of an offence and has been sentenced to a period of at least 12 months. The Judge stated that the appellant was given a sentence of imprisonment of only two months.
7. The Judge stated "despite the way it is phrased in paragraph 117C that cannot be taken to mean that the deportation of someone who has been sentenced only to 2 months imprisonment, rather than 12 months, is not in the public interest, however plainly there is less public interest in the removal of those sentenced to a short period. In addition, with regard to this appellant's sentence is, at the date of this decision, spent. He has not been convicted of any other offence since in the United Kingdom".
8. In the refusal letter at paragraph 85 is reference to the appellant's identity being used as an alias. The paragraph is unclear but was in any event not relied on by Ms Owen as she had no information about what was being suggested in that paragraph.

9. The Judge stated that on the one side there is a person who has committed a crime in the United Kingdom, who was sentenced to a very short period of imprisonment and his offences are now spent. On the other hand, the appellant has now been in the United Kingdom for 21 years and has not been charged that any other criminal offences. Clearly section 117B considerations have to be taken into account as the appellant's time in the United Kingdom has largely been on a precarious basis.
10. The Judge stated, the public interest in removing the appellant is reduced by the unexplained delay on the part of the Secretary of State following receipt of the application made by the appellant in July 2010. It was not until four years later, on 9 August 2014 that the Secretary of State decided to refuse to revoke the deportation order. That does not suggest that the Secretary of State considers there to be any significant public interest in the removal of this appellant. The evidence is that those working for the respondent are of the view that it was not possible to remove the appellant and in 2009, a final attempt was made to obtain a travel document by an interview of the appellant with the Eritrean Embassy. The respondent says that it was the fault of the appellant that he failed to obtain the necessary travel documents. It is for the respondent to prove as she has made the assertion that it is the appellant's fault that he did not obtain a travel document, but no evidence has been produced to support this claim and I do not find the appellant was at fault.
11. The appellant has lived in the United Kingdom longer than he has lived in Eritrea. He left that country when he was 16 years old and spent two years in Sudan and has been in the United Kingdom for 21 years, albeit with no leave. The offence for which he was convicted was plainly not a particularly serious one, as he was only sentenced to 2 months and he served nine days in prison. The appellant has committed no further offences and the offences are now spent. He does not appear in those circumstances to be a risk to the public.
12. The appellant's medical issues were considered and Judge noted that the appellant is currently receiving medication or treatment for these conditions. He stated that the medical report of 15 June 2010, which is the most recent that was lodged, referred to the appellant being stressed by this situation. The judge noted that this is not surprising bearing in mind the length of time that he has been in this country without any leave.
13. The Judge was not satisfied that removal of this appellant from the United Kingdom after 21 years is legitimate to the public aim of prevention of disorder or crime, as in the 20 year period, he has been convicted only of one offence which was plainly minor as it attracted a very short sentence and that sentence is now spent. The legitimate public aim does not seem to have been given a high priority by the Secretary of State in light of the four-year delay in dealing with the appellant's application in 2010. The public interest in the removal of this appellant is extremely low for those reasons and it is outweighed by the length of time that the appellant has been in the United Kingdom.

## The grounds of appeal

14. The grounds of appeal asserted that because there is no provision for a deportation appeal to be allowed on Article 8 grounds outside the Immigration Rules. It is either allowed under paragraph 399 or 399A or granted leave under paragraph 399B, or it is allowed under very compelling or exceptional circumstances which is under the Rules at paragraph 398 and also leads to a grant of leave under paragraph 399B. This is the complete code which was upheld by the Court of Appeal in **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**.
15. The Judge has failed to give regard to the government's view on what are compelling or exceptional circumstances. The appellant needs to demonstrate his circumstances are something above and beyond that in paragraph 399 (a) or 399 (b) to succeed under very compelling or exceptional circumstances grounds. The Judge has failed to identify why the appellant circumstances are very compelling or exceptional. The appellant circumstances have not materially altered since his appeal was dismissed. The appellant has been convicted of attempting to pervert the course of justice, has been found at previous appeals to be not credible and has used false documents. Therefore he is not a credible witness and his evidence cannot be trusted and the Judge has not taken into account any of these considerations.
16. The appellant stay in the United Kingdom has been either unlawfully or precarious and therefore in accordance with paragraph 117B of the Immigration Act 2014, little weight should be given to his private life which the judge has failed to do. There is nothing about the appellant's private life at all which could not continue in Eritrea. Whilst his residence has been lengthy, it has been unlawful and precarious at all times, he cannot be said to have become integrated here and to have become estranged from life in Eritrea. The onus has been on the appellant to leave the country and he has failed to do so.
17. The appellant has family in Eritrea who he is in contact with them. He speaks the language and he has spent his youth and formative years in Eritrea, so there would not be very significant obstacles to his reintegration in to Eritrea. The Judge has placed weight on the appellant's mental health problems at paragraph 29 of his determination, but the evidence does not support this finding and there is no evidence beyond 2010 of his medical problems. The Judge has given no consideration to the available medical treatment in Eritrea. The appellant circumstances therefore cannot be said to be exceptional.
18. There are no factors in the appellant circumstances which set it apart from an ordinary private life claim. The appellant circumstances are not very strong to outweigh the public interest in line with the case of **SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550**. Most recently in the case of **The Secretary of State for the Home**

**Department v AJ (Angola) [2014] EWCA Civ 1636**, the Court of Appeal emphasised the importance of Tribunal's considering Article 8 claims within the rubric of the new Rules.

19. The Judge failed to take into account that the Court of Appeal decision in **AJ** which stated that the scales were "very heavily weighted in favour of deportation, and something "very compelling" was required to outweigh the public interest in deportation given the circumstances of this case.
20. The appellant has been convicted of attempting to pervert the course of justice and has been found in previous appeals to be not credible and has used false documents and therefore cannot be trusted. Even if the appellant is at low risk of reoffending, there is a need to deter others from similar offences. There has been no delay by the Secretary of State as attempts have been made to obtain a travel document and the appellant has failed to comply with this.
21. There is a strong public interest in favour of the appellant's deportation. The cases of **AM v Secretary of State for the Home Department [2012] EWCA Civ 1634** and **Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046** provides helpful guidance to the instant appeal.
22. In the case of **AM** it was held that deportation in pursuit of the legitimate aim of preventing crime and disorder, is not to be seen as a one-dimensional in its effect. It has the effect not only of removing the risk of reoffending by the deportee himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in the system of control whose loss would itself tend towards crime and disorder. In the case of **Masih** it was found that "in a case of automatic deportation full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lie not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place "... deportation of foreign criminals express society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them".
23. The Judge has failed to carry out a thorough assessment taking into consideration society's revulsion against the kind of crime that the appellant committed and the deterrence of other foreign criminals. The Court of Appeal in **DS (India) v Secretary of State for the Home Department [2009] EWCA Civ 544** held that even if it could probably be said that there was no risk of reoffending, the respondent would be entitled to say in appropriate circumstances that the removal of an offender from the country was in the public interest. This is because the public interest in the deportation of those who commit serious crimes goes well beyond the need to deprive the individual of the opportunity of the chance to reoffend in this country: it extends the need to deter others and

to prevent serious crime generally and to uphold the public abhorrence of such offending. It is submitted had the Judge taken these issues into consideration, he would have found that the decision to deport is proportionate.

**Is there an error of law in the determination?**

24. The Judge in his determination put considerable emphasis on the fact that the appellant was only sentenced to 2 months imprisonment and that is clearly not sufficient to undermine the respondent's public interest in removal of a foreign citizen having committed a crime in the United Kingdom. He also lay emphasis on the fact that the appellant's conviction was now spent. The Judge therefore concluded that the public interest in the removal of this appellant is extremely low and is outweighed by the length of time the appellant has been in the United Kingdom, the low risk of reoffending evidenced by his lack of reoffending and the interference in his private life in removing him after such a lengthy period in the United Kingdom is not a proportionate interference with the appellant's private life established in the United Kingdom.
25. I find that the judge fell into material error for the following reasons. Paragraph 390 of the Immigration Rules requires consideration of all the circumstances and expressly states that one factor to be considered is 'the grounds on which the (deportation) order was made'. Consideration of this factor in my view requires reference to paragraph 364 of the Immigration Rules. Paragraph 364 deals with the circumstances in which a deportation should be made against a person liable to be deported. Those circumstances must apply as much to a decision whether to revoke a deportation order under paragraph 390 as they do to a decision whether to make a deportation order in the first place. Paragraph 364 states that it is intended that the power to deport should be exercised in a manner that is 'consistent and fair as between one person and another'. That aim would be undermined if a decision to make a deportation order and a decision to revoke a deportation order were each based on different criteria.
26. This does not mean that an application under paragraph 390 of the Immigration Rules is a mechanism for achieving a *de novo* consideration of whether the power to deport should be exercised. The starting point in a decision under paragraph 390 must be that a decision to exercise the power to deport has already been made, and that the existing decision will stand unless there is a reason why it should not. The power in paragraph 390 must be intended to cater for situations where there has been a change in circumstances since the deportation order was made, or some other reason, such that an exercise of the power to deport would no longer be appropriate in accordance with the paragraph 364 criteria.
27. The Judge in allowing the appellant's appeal ignored the nature of the offence which is, use of a false passport, which is an offence of the sort that undermines the good order of society. The appellant had no right to

live in this country but nevertheless remained. The Judge did not properly take into account that the appellant's stay in the United Kingdom has been precarious from the very beginning. The Judge failed to take into account that it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport.

28. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority. The Judge failed to take into account that the appellant removed his tag which was the condition of his release, which led to his being detained again.
29. In **JO (Uganda) v Secretary of State for the Home Department [2010] EWCA Civ 10** the Court of Appeal said at paragraphs 29-30 that in the application of Article 8 there is a material difference between deportation cases on the one hand, and administrative removal cases on the other:

"... they generally involve the pursuit of different *legitimate aims*: in deportation cases it is the prevention of disorder or crime, in ordinary removal cases it is the maintenance of effective immigration control. The difference in aim is potentially important because the factors in favour of expulsion are in my view capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given correspondingly greater weight in the balancing exercise. Thus I think it perfectly possible in principle for a given set of considerations of family life and/or private life to be sufficiently weighty to render expulsion disproportionate in an ordinary removal case, yet insufficient to render expulsion disproportionate in a deportation case because of the additional weight to be given to the criminal offending on which the deportation decision was based. I stress "in principle", because the *actual* weight to be placed on the criminal offending must of course depend on the seriousness of the offences and the other circumstances of the case.

Where the person to be removed is a person unlawfully present in this country who has also committed criminal offences, the decision to remove him may pursue a double aim, namely the prevention of disorder or crime as well as the maintenance of effective immigration control. If that is the case, it should be made clear in the reasons for the decision, since it affects the way in which the criminal offending is factored into the analysis. Where the prevention of disorder or crime is an aim, the person's criminal offending can weigh positively in favour of removal, in the same way as in a deportation case. But if reliance is placed only on effective immigration control, it is difficult to see how the person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the proportionality balance by reducing the

weight to be placed on the person's family or private life: to take an obvious example, where a person has spent long periods in detention, his family ties and social ties are likely to be fewer or weaker than if he has been in the community throughout. Criminal offending can therefore remain relevant even if the maintenance of effective immigration control is the only aim of the removal decision; but careful account must be taken of how it bears on that decision.”

30. I note that the Court of Appeal referred in this passage that the protection of society against ‘serious crime’. I do not consider that this should be understood as seeking to distinguish between persons deported after conviction for a ‘serious crime’ and those deported after conviction for a ‘less serious crime’. In any case in which a person is lawfully deported as a result of a conviction for a crime, whether because the Secretary of State considers deportation to be conducive to the public good or because a court has recommended a person for deportation, the crime is sufficiently ‘serious’ to merit deportation. As the Court of Appeal said in the quoted passage, ‘the *actual* weight to be placed on the criminal offending must of course depend on the seriousness of the offences and the other circumstances of the case’. I consider the quoted passage to be generally applicable to all cases of deportation following conviction for a crime.
31. The Judge fell into material error with his finding that the appellant’s offending was not serious enough because it only attracted two months imprisonment notwithstanding that the court recommended deportation. He also fell into material error when he failed to appreciate that the appellant has been convicted of attempting to provide the course of justice, has been found at previous appeals not to be a credible witness and cannot be trusted to tell the truth.
32. The Judge acknowledged in his determination at paragraph 9, that at the first asylum appeal hearing, the appellant was found to be an Eritrean national. The judge found him to be inconsistent about the events that took place prior to his departure and concluded his account was not credible because of inconsistencies. At paragraph 10, the Judge noted that the appellant said that his father was from Ethiopia and his mother from Eritrean. He noted that in the screening interview, when the appellant first arrived in the United Kingdom on 24 November 1993 he said both his parents were from Ethiopia but in his statement of evidence form he said that his father was of Ethiopian nationality and his mother was an Eritrean and the first-tier Tribunal Judge hearing his appeal, considered his claim on the latter basis.
33. At paragraph 11 the judge noted that the second determination which was promulgated 10 years later, in 2006 the Judge in his determination, noted that there was no additional evidence to suggest that the appellant was not Eritrean and that his application was under Article 3 and Article 8 only. The Judge concluded in the second asylum appeal that the appellant was an Eritrean national and that finding has not been overturned by any subsequent judicial process following the first determination.



34. At paragraph 13 the Judge noted that the appellant still maintains that he is Eritrean and has given no explanation for the different nationalities he has attribute it to his parents in the previous asylum applications he has made. The Judge noted that the in his first asylum appeal, the Judge stated in his determination said that after the appellant left Eritrea, he could not get in contact with his family. The Judge stated that was some three years ago and the appellant now says that he is in touch with his mother and with his sisters who are in America but has not given an explanation as to how he came to be in contact with them.
35. These findings by the Judge does not reflect in his decision to allow the appellant's appeal pursuant to Article 8. Had the Judge taken this into account, in assessing the appellant's credibility he might have come to a different conclusion.
36. This is especially so about his finding that the appellant was not to blame for the Eritrean Embassy not giving him travel documents. The Judge noted the appellant's telephone call to the Eritrean Embassy "clearly did not result in a travel document but failing to obtain a travel document for unexplained reasons is not sufficient evidence to show he is stateless. At paragraph 27, the Judge noted that a final attempt was made to obtain a travel document by interview with the appellant with the Eritrean Embassy. That failed for reasons the respondent says was the fault of the appellant. The judge noted "it is for the respondent to prove she has made that assertion but no evidence has been produced to support that claim and I do not find that the appellant was at fault.
37. It was clear to the Judge that the appellant has found to be not credible by two First tier Tribunal Judges. The Judge although fully aware that the appellant was said to have lacked credibility in previous determinations, nevertheless found that the appellant was not at fault without giving adequate reasons.
38. At Paragraph 11 the Judge who heard the appellant second appeal in his determination promulgated in 2006 stated that the Judge "was not satisfied that the appellant could not provide evidence to show that he was an Eritrean national to the Eritrean authorities and concluded that this was because the appellant was unwilling to leave the United Kingdom". Also the Judge, at paragraph 27 of his determination stated that "the evidence before me was that those working for the respondent took the view it was not possible to remove the appellant and in 2009 final attempt was made to obtain a travel document by an interview with the appellant with the Eritrean Embassy.
39. These findings are at odds with the Judge's conclusion that the appellant was not at fault for the Eritrean Embassy's failure to give him travel documents. The Judge by stating that the burden is on the respondent to show that the appellant is at fault, whilst not a misdirection, did not take into account that there was evidence before him that the appellant was attempting to frustrate removal. The Judge failed to consider that the

appellant has accepted that he is an Eritrean national and there is some force to the respondent's argument that he made it difficult to be removed by not telling the Eritrean Embassy he is an Eritrean national. The Judge fell into error by failing to take into account all the evidence in the round.

40. The Judge stated, the public interest in removing the appellant is reduced by the unexplained delay on the part of the Secretary of State following receipt of the application made by the appellant in July 2010. The Judge failed to take into account that the delay was explained to some extent as the appellant failed to leave the country when all his applications to remain in this country were refused and he did not have to wait for the respondent to remove him. The delay was also explained by the fact that the appellant was attempting to frustrate removal. The Judge fell into material error in finding that the respondent's delay meant that she did not have an interest in the appellant's removal from this country.
41. The seriousness of the offence of which the respondent was convicted was a matter not taken into account by the Judge. He was convicted of perverting the course of justice and used a false document to leave the country for Scotland. He also did not take into account that the appellant's circumstances had not changed since the deportation order was made. The jurisprudence suggest that the public interest in preventing the fraudulent use of passports to gain entry or support residents is of considerable importance and deserves protection. As was stated in **R v Benabbas [2005] EWCA Crim 2113** at paragraphs 41-42:

“While we would be reluctant ourselves to go as far as Lawton LJ did in *Nazar*; in suggesting that a recommendation for deportation should be automatic in the case of every overstayer - and the case of *Akan* supports us in that view - we do think that the public interest in preventing the fraudulent use of passports to gain entry or support residence is of considerable importance and deserves protection. Moreover, in such a case the issue of *Nazari* detriment is intimately bound up with the protection of public order afforded by confidence in a system of passports. We think that the sentencing judge was correct to say that the use of stolen and forged passports undermine the good order of society. In our judgment, such a view is consistent with what the ECJ has said in *Bouchereau*, which subsequent English authorities have said to be the same as the detriment principle (see *Escauriaza, Cravioto*).

We therefore think that *Current Sentencing Practice* is correct to distinguish at K1-5D and K1-5E between the case of a person who enters the United Kingdom by fraudulent means and the case of a person who is in the country unlawfully and is convicted of an offence unconnected with his status and the circumstances in which he entered the country. ...”

42. In **R v Kluxen [2010] EWCA Crim 1081**, the Court of Appeal said that:

“In our view it will rarely be that [the relevant] test is satisfied in the case of an offender none of those offences merits a custodial sentence of 12 months or more. An offender who repeatedly commits minor offences could conceivably do so, as could a person

who commits a single offence involving for example the possession or use of false identity documents for which he receives a custodial sentence of less than 12 months (as in *Bennabas* above). But we repeat that such cases will be rare; and we observe that even if a court makes no recommendation for an offender's deportation, the Secretary of State may nevertheless deport him if he deems this conducive to the public good."

43. In this case the respondent continued to live in this country even after all his appeal rights were exhausted and when he knew that he was here illegally. I find that the appellant was in no doubt that he had no right to live in this country and that he should leave, and that his failure to do so was a conscious disregard of the immigration law of this country. Consistent with what was said in **Benabbas**, I find that the public interest in preventing the fraudulent use of passports either to support residence of a person here is of considerable importance and deserves protection, as is the protection of public order afforded by confidence in a system of passports. I agree that the use of fraudulent documents undermines the good order of society.
44. Having considered the determination as a whole, I conclude that the Judge erred in law in his evaluation of the appellant's appeal. Although I indicated at the hearing, that a full chronology would be beneficial to re-evaluate the appellant's appeal, I have decided that I would not be assisted by a full chronology and it is not necessary for the appeal to be reheard. I have considered the appellant's appeal and find that the appellant has not demonstrated any compelling or exceptional circumstances whereby he should succeed pursuant to Article 8 when he cannot succeed pursuant to the Immigration Rules.
45. I therefore set aside the First-tier Tribunal's determination decision and allow the Secretary of State's appeal and uphold the removal directions.

### **Decision**

The Secretary of State's appeal is allowed

Dated this 26<sup>th</sup> day of May 2015

Signed by

.....  
A Deputy Judge of the Upper Tribunal  
Mrs S Chana